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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jacqueline Scott Corley, Judge

WAYMO LLC,)	
)	
Plaintiff,)	
)	
VS.)	NO. CV 17-00939-WHA
)	
UBER TECHNOLOGIES, INC., ET)	
AL.,)	
)	
Defendants.)	
_____)	

San Francisco, California
Thursday, May 11, 2017

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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(Appearances continued on the next page)

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REALTIME ROUGH DRAFT ONLY

Thursday - May 11, 2017

2:07 p.m.

P R O C E E D I N G S

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THE CLERK: Remain seated and come to order. Court is now in session, the Honorable Jacqueline Corley presiding.

California Civil Action C 17-939, Waymo vs. Uber.

Counsel, please come up to the podium and state your appearance.

MS. BAILY: Good afternoon. Melissa Baily and David Perlson for Waymo.

MR. GONZALEZ: Good afternoon, Your Honor. Arturo Gonzalez from Morrison & Foerster on behalf of Uber.

MR. CHATTERJEE: Good afternoon, Your Honor. Neel Chatterjee of the Goodwin firm for Otto Trucking.

MR. EHRLICH: Good afternoon, Your Honor. Miles Ehrlich of Ramsey & Ehrlich on behalf of nonparty Anthony Levandowski.

MR. COOPER: And John Cooper, Special Master.

THE COURT: Good afternoon.

The reason I set this hearing or status was because when Judge Alsup -- you guys must have totally worn him out at that Preliminary Injunction hearing because shortly thereafter, I get an email from him saying, *I'm just going to give you all discovery.*

So I wanted to set this up because I want to make sure --

1 and we talked a little bit about framework before, but with the
2 Special Master, I want to talk about framework because I just
3 have this suspicion that there is going to be a lot of
4 discovery disputes over the next few months, and I want to make
5 sure we have a framework, that we're all on board with how it's
6 going to work with the Special Master.

7 And then, of course, in the interim, I have these briefs
8 in front of me which are scheduled for hearing on the 8th, but
9 I think there may be some things that we can do between now and
10 then that will narrow and frame things a little better because
11 what I don't want to happen is I get here on the 8th and then I
12 say, *But now let's do this* or *what about this*, and there may be
13 things in the interim, so I want to talk about that.

14 But the first thing I want to ask about is the Acquisition
15 Agreement, Mr. Gonzalez. Has that been provided now?

16 **MR. GONZALEZ:** That is being produced today,
17 Your Honor.

18 **THE COURT:** Today. Okay.

19 So you will get that today.

20 **MS. BAILY:** We have not received it yet, but I trust
21 we'll get it today.

22 **THE COURT:** He said it in front of the Court. You
23 will get it today. All right.

24 So then let's talk just generally framework. The way I
25 kind of see things working in this case, which is what I would

1 hope would -- what I'm going to do is rely on Mr. Cooper to
2 tell me or Ms. Means in particular, *Okay, here is a dispute*
3 *that is ripe for you to decide*, and what that will do is it
4 will force the parties to go to him first because I think he
5 can probably help you narrow things quite a bit.

6 And so then when you're at impasse, then he can tell
7 Ms. Means -- and as I've said before, we can put things on very
8 quickly, but he can also then tell me this is how the parties
9 have decided to brief it, present it.

10 I'm going to leave that up to you and him. You have
11 complete freedom on how you want to do it. So you don't have
12 to do joint letters. If you prefer separate letters, it can be
13 10 pages, 5 pages, 50 pages, but -- I don't know if I'll read
14 it all, but if that's what you want to do, you can do it.

15 But I want it to all go through Mr. Cooper. He is really
16 the facilitator, the organizer because I think a lot of it --
17 and I know he has with you in the past -- can be narrowed quite
18 a bit. Then he will tell Ms. Means and then we'll schedule
19 hearings and I will know it's coming.

20 So nothing should ever be sent directly to me without it
21 going first to Mr. Cooper and then Mr. Cooper alerting me that
22 it's coming.

23 Does that work?

24 **MR. CHATTERJEE:** Yes, Your Honor.

25 I have one question about it.

1 **THE COURT:** Yes.

2 **MR. CHATTERJEE:** So just recently, it appears that
3 we're also going to be starting third-party discovery. I don't
4 know if there is going to be food fights on that front as well.
5 How do you want to handle those issues?

6 **THE COURT:** I would like the same thing, to go through
7 Mr. Cooper, because part of it is it's just a matter of
8 organization. I just can't -- if it's coming flying at me all
9 this way, I can't keep track of it. That's why we have a
10 Special Master in a case like this.

11 We all decided -- I think it makes great sense -- we
12 didn't want three levels of decision-makers. So he's not a
13 final decision-maker, but he's a facilitator and a
14 settlement -- or a mediator to the extent -- to help the
15 parties do that, and there is no reason with the third party he
16 can't do that as well, especially because he will know you so
17 well, though he knew you well before -- he will continue to
18 know you so well, he will be able to work with you and the
19 third parties, my hope is, to at least reduce the number of
20 disputes that have to be brought to the Court.

21 Okay. All right. So does that all make sense?

22 **MS. BAILY:** Yes, Your Honor.

23 **THE COURT:** Okay. All right.

24 Now, with respect to the pending motion to compel, which
25 is related to the Due Diligence Report -- and I did briefly

1 read through them. They're not -- I'm not going to decide
2 anything today. No worries.

3 But I guess there was one issue, I guess I had, for Waymo
4 was that Mr. Levandowski had moved to intervene for the
5 purpose, if I recall, just for filing an opposition.

6 **MS. BAILY:** Your Honor, our current thought about that
7 is that we would oppose that. It doesn't seem that there is
8 any particular Fifth Amendment issues that are addressed in
9 that brief.

10 We're still considering it. And actually just on
11 scheduling, which is related, currently our reply to the
12 briefs --

13 **THE COURT:** Don't worry about that --

14 **MS. BAILY:** But in terms of you mentioned the hearing
15 date and the hearing was set -- I think it might have actually
16 been our mistake -- on a normal motion schedule. The briefing
17 schedule had been set by Judge Alsup to be much faster, and we
18 would request an earlier hearing date. We don't see any need
19 to wait after our replies are due tomorrow.

20 **THE COURT:** You're prepared to file it tomorrow?

21 **MS. BAILY:** We are -- there is one hiccup. We are
22 prepared to file tomorrow.

23 When defendants filed their opposition, they submitted the
24 sworn record that they are apparently going to rely on in the
25 motion. They have now said that documents referenced but not

1 submitted in that record are going to be produced today.

2 Our position is that if they wanted them in the sworn
3 record, they should have been there, and we're prepared to file
4 our reply tomorrow.

5 If they are going to take the position or Your Honor is
6 going to consider taking a look at those materials in
7 connection with the motion, which we would argue is improper,
8 if that were the case, then we would be inclined to ask for a
9 one-day extension so that we can look at the documents that are
10 being produced later today.

11 **THE COURT:** Well, I was even wondering -- so this is
12 where I was wondering if the Special Master could help.

13 For example, a lot of the stuff that you were complaining
14 about with respect to how detailed the privilege log is, of
15 course, all is related to the ultimate legal question of
16 whether it's work product or if the work product has been
17 waived for disclosure to third parties or if the joint defense
18 privilege operates to protect that waiver. Is that sort of --
19 that's sort of how I see it --

20 **MS. BAILY:** It is. Our position is that that has
21 already shook out. Right? So they -- we asked and asked for
22 more detail in the log. They produced their final log. We
23 have issues with it, which are briefed now and are going to be
24 briefed in our reply. We have issues with the sworn record
25 that they submitted in support of their log. That's all taken

1 care of in this current briefing schedule.

2 Our position is that there should be no more delay, there
3 should be no more back and forth. It's all being briefed
4 according to Judge Alsup's schedule, and it will be ready for
5 decision.

6 **THE COURT:** You are prepared to just rely on that,
7 right, because sometimes a party wants more information because
8 they can have a more robust legal argument.

9 **MS. BAILY:** And we would be happy to take discovery.
10 There is a lot here that we want to take discovery on. Now
11 there are declarations that have some inconsistencies, like I
12 said. There are documents referenced that have not been
13 produced.

14 We would like to have discovery on all of that, but that
15 is irrelevant to the motion that is pending because they had a
16 burden and we are going to argue that they didn't meet it.
17 They had many opportunities to meet that burden, and we don't
18 think that we should delay the decision so that they can keep
19 trying to meet their burden.

20 **THE COURT:** Well, certainly not new documents, but
21 they have submitted documents with their opposition.

22 **MS. BAILY:** They have submitted declarations that
23 reference documents that have not been submitted.

24 **THE COURT:** Well, stop me if I'm saying something -- I
25 don't have -- so, for example, the Engagement Letter was

1 something that you referred to in your motion as having not
2 been produced or logged, but I thought it was attached to their
3 opposition.

4 **MS. BAILY:** That's correct. So a redacted version of
5 that document has been attached. We were aware of potentially
6 the existence of that document, which is why we called it out.

7 In opposition, documents about which we had no awareness
8 are referenced in declarations. However, they are not
9 submitted as attachments as part of the sworn record that
10 defendants submitted for consideration.

11 Now, they had their chance, and, you know, we don't think
12 that there needs to be anymore delay for there is documents to
13 be produced and considered. They weren't submitted. They're
14 not part of the record. And we should move forward and get a
15 decision.

16 **THE COURT:** All right. So you are satisfied with the
17 record as it's -- so what they've submitted, they've submitted;
18 I'll consider; and you're satisfied then with the record. You
19 don't want, for example, any argument as to what was redacted,
20 that you should be able to see that?

21 **MS. BAILY:** Well, no. There might be arguments about
22 that, but it's not germane to the issue in this motion.

23 **THE COURT:** That's what I mean. In connection with
24 this motion.

25 **MS. BAILY:** So it's not like we waive all rights --

1 **THE COURT:** Of course not. Right. Of course not.
2 Did you want to say something?

3 **MR. GONZALEZ:** Not yet, Your Honor.

4 **THE COURT:** Okay.

5 **MR. GONZALEZ:** I'm just listening.

6 **THE COURT:** Anyone over there?

7 **MR. CHATTERJEE:** I'll say one thing.

8 It sounds like if they have discovery issues with us, that
9 should be the issue that is taken to Mr. Cooper and doesn't
10 need to be resolved today.

11 **THE COURT:** No. Nothing. None of that -- that's
12 exactly what they're saying, actually, is that they're
13 satisfied with having me decide the motion based on the record
14 as it stands, the log as it stands, the documents that you've
15 produced, that weren't produced earlier, but they'll just
16 accept them. They're there as they are --

17 **MS. BAILY:** I mean -- and, Your Honor, just to be
18 clear, right, so we're filing our reply tomorrow, a portion of
19 which will deal with this discovery. You know, our position is
20 that the record is insufficient --

21 **THE COURT:** No. I understand.

22 **MS. BAILY:** -- as it is --

23 **THE COURT:** Right.

24 **MS. BAILY:** That said, if Your Honor has questions or
25 they come back at a hearing and make some new argument, you

1 know, then, you know -- it's a little bit of a rock and a hard
2 place. Right?

3 They want us to brief the issue, having provided an
4 incomplete record. We think that they haven't met their burden
5 because of that. Right?

6 But, you know, if we get materials today that are
7 referenced in their -- you know, in their opposition that they
8 didn't deem worthy of citing, you know, in the record, what is
9 it going to say, I don't know. Right? I don't know.

10 And maybe we'll raise with Mr. Cooper or raise with
11 Your Honor, *Well, you know, now they're belatedly coming*
12 *forward with X, Y, and Z. Well, I don't know what it says.*
13 Right? So it's difficult.

14 **THE COURT:** No. I understand.

15 I understand your argument to be, *We believe that on this*
16 *record, as it stands today when we submit our reply --*
17 *tomorrow, or if you want an extra day, that's fine -- that we*
18 *will win. If, though, we come to the hearing, whatever we set*
19 *the hearing for, it looks like, Judge Corley, you may be*
20 *wavering a bit or have some questions, at that point -- we want*
21 *to reserve our right at that point to maybe say, well, maybe we*
22 *do need something like that.*

23 **MS. BAILY:** That's correct.

24 **THE COURT:** I hear what you're saying. Okay.

25 You still don't -- just still standing --

1 **MR. GONZALEZ:** I'm just waiting, Your Honor.

2 **MR. EHRLICH:** I'll chime in.

3 **MR. GONZALEZ:** Let me add one thing and then you'd be
4 happy to add the chime.

5 I don't know what the appropriate procedure is for raising
6 this issue, but I suspect that when they file their reply
7 brief, they're going to make a lot of brand new arguments that
8 were not part of their opening papers. That's what I suspect.
9 If I'm wrong, so be it. If all they do is respond to our
10 points, fine.

11 But if they make brand new arguments, this is a matter
12 that is likely going to end up, one way or the other, in the
13 Federal Circuit, and we need to get it right.

14 So if they do make brand new arguments, given that we've
15 got a little bit of time, we would ask for leave -- and I don't
16 know what the appropriate procedure is -- to file a very short
17 surrebuttal brief that only addresses any new arguments that
18 they might raise.

19 Now, if they don't raise anything new, I won't have an
20 issue, but I suspect that they are going to.

21 **THE COURT:** I'm not going to say anything and I'm not
22 going to give you an advisory opinion. I'm not going to say
23 anything in advance. You'll do what you do when we get to the
24 hearing and I'll say what I say and, you know, decide what I
25 decide.

1 **MS. BAILY:** Your Honor, I would say that anything that
2 they characterize as *new arguments* is because they withheld the
3 information --

4 **THE COURT:** That's why -- but I got it. I got it.

5 But he's right in the sense that I do want to -- I don't
6 know if I'll get it right. I do want to do my best and make my
7 best decision because we're -- and then I assume whatever I do
8 will get appealed to Judge Alsup and whatever he does will get
9 appealed to the Federal Circuit. So at least I have that
10 comfort.

11 **MR. GONZALEZ:** Your Honor, I guess my question really
12 was a procedural one, which is, is that an issue that you would
13 like us to address with the Special Master first?

14 **THE COURT:** I don't -- sure. Sure.

15 **MR. GONZALEZ:** Or not?

16 **THE COURT:** Because it may be helpful. For example,
17 you could ask Mr. Cooper whether, you know -- you could say to
18 him, you know, *We actually think this is a brand new argument,*
19 and Mr. Cooper could say, *You're full of it, and, no,*
20 *Mr. Gonzalez, Judge Corley will never buy that,* and then so
21 maybe you'll just decide, *Well, I don't want to waste my good*
22 *karma.*

23 **MR. GONZALEZ:** On the other hand, on the other hand,
24 if Mr. Cooper agrees with me that these do appear to be new
25 arguments and if he were to advise that it would be reasonable

1 for us to have a short surreply, then they would have an
2 opportunity to either agree to that, or if not, we come to you.

3 **THE COURT:** You come to me, right. But he's not the
4 decision-maker.

5 **MR. GONZALEZ:** Understood.

6 **THE COURT:** That is sort of to give you a neutral's
7 view to help the parties make decisions about what they want to
8 bring to me. I think it's a good idea to run everything by
9 him. He has incredibly good judgment.

10 **MR. GONZALEZ:** That is the clarity I seek.

11 **THE COURT:** Mr. Ehrlich, they did not want you at the
12 party.

13 **MR. ERHLICH:** Thank you.

14 **THE COURT:** Actually, they would change their mind and
15 allow you at the party if your client would speak.

16 **MR. ERHLICH:** So I'm told.

17 That raises -- Ms. Baily raises something that may also
18 need some clarity as to whether Mr. Cooper will be addressing
19 the issue of whether we are permitted to intervene for the
20 purpose of this motion.

21 I would say the record is quite clear that Mr. Levandowski
22 was a party to this joint defense --

23 **THE COURT:** Can I ask you something, though?
24 Something they mentioned in their Motion to Compel, I think,
25 was that when he was asked at deposition to even acknowledge

1 the existence of the Due Diligence Report, if I recall, he
2 wouldn't even answer that question. Now, I could be wrong. I
3 thought that's what I read.

4 If that's the case, how does he have any standing to come
5 in and move to intervene? Because by moving to intervene, he
6 has to acknowledge that he's a party to the agreement.

7 **MR. ERHLICH:** Well, we briefed the issue, and the
8 evidence is before the Court, that he -- that he signed it. I
9 mean, he's -- he's signed -- a signatory to the agreement that
10 was submitted before Judge Alsup several weeks ago.

11 **THE COURT:** No. I know it is. It's just an
12 interesting question because it seems a little playing fast and
13 loose -- I'm just going to say, playing fast and loose with the
14 courts to, on the one hand when you're asked the question at
15 deposition in a civil case, he is not required to plead the
16 Fifth to everything. In fact, when courts have to decide
17 whether there is an adverse inference or not, they are supposed
18 to really do it on a question-by-question basis.

19 When asked that question, he refused to even acknowledged
20 the agreement's existence. But now he's moving to intervene in
21 something that's directly contradictory to his testimony.

22 **MR. ERHLICH:** Two answers there, Your Honor. It's a
23 fair question.

24 One is the -- I have -- I don't know if, in fact, that's
25 the question and answer that took place.

1 **THE COURT:** Sure enough.

2 **MR. ERHLICH:** It may be. We were clearly asserting
3 very, very broadly. That's well-known.

4 Our concern in these instances where we have a client who
5 is in that situation where they need to invoke their
6 constitutional rights is to be very concerned that civil
7 litigants will try to shoehorn any answer as a waiver of
8 subject matter and pry open and then claim he's waived.

9 **THE COURT:** Why isn't bringing the motion then that
10 same waiver? I mean, you shouldn't be able to have it both
11 ways. If it's not a waiver, it's not a waiver, but you
12 shouldn't be able to avoid a waiver argument by just making
13 attorney argument.

14 **MR. ERHLICH:** No. That's -- that's true. Your Honor
15 may know that we've filed a motion seeking permission to file
16 an in camera submission from Mr. Levandowski --

17 **THE COURT:** Yes. I --

18 **MR. ERHLICH:** -- to address -- I mean, if it's clear
19 that there is no waiver, clearly it's our position he's a party
20 to this agreement. We submitted it. We have evidence before
21 the Court.

22 The Fifth Amendment is a little different question. When
23 you take the Fifth Amendment, there can be the possibility of
24 an adverse inference, but as was heavily litigated, that's only
25 when there is corroborating evidence for the inference you're

1 trying to draw.

2 And clearly he's a party to the agreement. We're not
3 contending otherwise. The record, I think, more than
4 establishes that he has rights that are at stake that the Court
5 is going to adjudicate if the Court is to going to evaluate the
6 vitality of this joint defense common interest privilege.

7 If the Court would prefer a submission just on that point
8 where he's acknowledging that he's a party to it, I don't know
9 that that would be --

10 **THE COURT:** I don't know if I prefer one. It struck
11 me when I was reading it and I read through that that there was
12 an inconsistency there. I don't know what it means. I'm not
13 going to adjudicate it today.

14 So there are two things, and I understood the main thing
15 about the Motion to Intervene was wanting to have standing and
16 ability to appeal, as we all acknowledged. This is the
17 beginning. To appeal. And so that's there. That's one.

18 The second issue is the submission of something ex parte
19 that Waymo wouldn't see; right?

20 **MR. ERHLICH:** Correct. In camera.

21 **THE COURT:** Would -- Uber or Otto presumably would see
22 it?

23 **MR. ERHLICH:** No.

24 **THE COURT:** Would not either?

25 **MR. ERHLICH:** No.

1 **THE COURT:** Just the Court?

2 **MR. ERHLICH:** Only the Court.

3 **THE COURT:** What I will tell you is I'm not going to
4 look at it until I adjudicate whether it would even be proper.
5 So I'm not even going to look at it because that to me seems
6 very dicey on this particular motion.

7 I understand on a motion with respect to the Fifth
8 Amendment privilege that's different. But here we're just
9 talking about the Due Diligence Report and its exhibits.
10 That's what we're talking about.

11 **MS. BAILY:** We will be filing an opposition to the
12 motion so you will have the benefit of that, Your Honor.

13 **THE COURT:** Well, I guess that all depends on timing.

14 **MS. BAILY:** We were going to file that opposition
15 either with our reply or a day after, you know, so very
16 quickly. We would like to get all of these issues resolved
17 very quickly because a ruling on these issues will affect other
18 discovery, and under the current proposed schedule, discovery
19 is only going to be about two and a half months, so we don't
20 want to dilly-dally with these things.

21 We are going to respond to the Motion for Leave either
22 tomorrow with our reply or on Monday we were planning to.

23 **THE COURT:** And you do know that the report itself was
24 provided to the Court for in camera review?

25 **MS. BAILY:** We're aware of that, yes.

1 **THE COURT:** All right.

2 **MR. ERHLICH:** Your Honor, can I just make a comment
3 about that?

4 **THE COURT:** Yes.

5 **MR. EHRlich:** Because I think we had a more fulsome
6 discussion before Judge Alsup earlier in the case.

7 The due diligence process, as we -- Mr. Ramsey and I
8 argued earlier -- there is a question of privilege that is
9 overarching and whether this is a valid privilege --

10 **THE COURT:** You mean the joint defense?

11 **MR. ERHLICH:** The joint defense common interest
12 privilege.

13 There is also underlying that a core Fifth
14 Amendment/*Hubbell*, active production concern, and that is
15 something that we think is appropriately, for the reasons
16 stated in our papers, addressed in camera.

17 **THE COURT:** Well, you can brief it. No one is making
18 Mr. Levandowski produce anything. The Motion to Compel isn't
19 directed to him; right? So the first legal issue --

20 **MR. ERHLICH:** There is a subpoena directed to
21 Mr. Levandowski.

22 **THE COURT:** But this report, this Due Diligence
23 Report --

24 **MR. ERHLICH:** Correct.

25 **THE COURT:** -- was in the hands -- is it not -- is in

1 the hands of Uber and Otto and maybe the author; right?

2 **MR. ERHLICH:** That's correct.

3 **THE COURT:** So nothing is coming from your client. So
4 the first legal question I guess I would need to have
5 answered -- and I haven't read your brief so perhaps it's in
6 there -- is how the Fifth Amendment is even implicated given
7 that nothing is coming from him, no one is asking him to do
8 anything. He can be as far away from it as he wants. No one
9 is asking him to do it.

10 Has that been addressed?

11 **MS. BAILY:** Your Honor, Judge Alsup has already
12 addressed just that issue. I believe it's Docket 205.

13 **THE COURT:** Is that with respect to the privilege log?

14 **MS. BAILY:** Right. But where he essentially found
15 that there is no Fifth Amendment right to avoid testimony by
16 production when there is no -- this issue has nothing to do
17 with discovery from Mr. Levandowski.

18 We have those issues, but that's not one of these issues
19 on the Due Diligence Report.

20 **MR. ERHLICH:** I don't think that's quite accurate, if
21 the Court reads Judge Alsup's order.

22 It was a dispute about whether the third party due
23 diligence vendor could be named on a privilege log. But Judge
24 Alsup, in the order, went through a number of very
25 uncontroversial premises about the Fifth Amendment and how it

1 would apply.

2 And the language that's most relevant here is he
3 acknowledged that under *Fisher vs. United States*, which is the
4 predecessor to *Hubbell*, to the extent there is a valid
5 attorney-client privilege -- and at that point, there wasn't as
6 fulsome record as there is now -- to the extent there is a
7 valid attorney-client privilege, a client sharing any tangible
8 items, anything for review by an attorney, compelling counsel
9 to produce is the same as compelling an individual.

10 So it does raise the *Hubbell* concern if the Court were to
11 conclude that this is a valid joint defense common interest
12 privilege.

13 **MS. BAILY:** Judge Alsup also found that there was
14 no -- that production by counsel was not implicated. We're
15 talking about production by Uber.

16 **THE COURT:** All right. So my question is -- because
17 I'm not resolving that today. This is just a preview.

18 Is that already -- that's briefed then? Because I
19 haven't -- as I said, I haven't read your brief yet.

20 **MR. ERHLICH:** The Fifth Amendment issue is not
21 squarely briefed in connection with this Motion to Compel. It
22 has been briefed before in the case, and we could --

23 **THE COURT:** You could just refer me to those briefs.

24 **MR. ERHLICH:** Yes. We could do that.

25 **MS. BAILY:** Your Honor, I just want to flag that this

1 kind of serial, you know, raising of issues -- you know,
2 Mr. Levandowski filed all manner of paper with respect to this
3 motion, so the notion that this wasn't raised, if they intended
4 to raise it --

5 **THE COURT:** Well, I raised it.

6 **MS. BAILY:** Right. Exactly.

7 But if there was going to be an issue with respect to the
8 Fifth Amendment with respect to Uber's production of a due
9 diligence document, it should have been raised when they filed
10 all their other papers on this motion because there is this
11 tendency to do things serially with respect to
12 Mr. Levandowski's Fifth Amendment rights, and we don't have
13 time for it under the schedule.

14 **MR. PERLSON:** Sorry, Your Honor. If I could intervene
15 one thing?

16 **THE COURT:** Do you oppose his intervention? I'm just
17 kidding.

18 **MR. ERHLICH:** No.

19 **MR. PERLSON:** In reference to Mr. Levandowski, you
20 know, this first thing that Ms. Baily refers to started with
21 the secret hearing that they called where they were asking for
22 the Court's advice on Fifth Amendment, and then the Court even
23 commented that what happened is, as it went on -- is as they
24 were losing one argument, they would raise another argument.
25 They would lose one argument, they would raise another

1 argument.

2 They're doing the same thing here, and I will note,
3 Your Honor -- and this is probably something that we'll be
4 raising very soon -- that Mr. Levandowski himself has violated
5 the Court's orders in relation to the subpoena as to him
6 grossly. And he is personally obstructing our ability to take
7 discovery in this case. He was ordered to produce documents on
8 the day of his deposition. That was about a month ago --

9 **THE COURT:** Okay. You know who you're going to talk
10 to about that first? Mr. Cooper.

11 **MR. PERLSON:** Understood.

12 But, Your Honor, what's happening here is that there seems
13 to be some interest in Mr. Levandowski and hiding things that
14 he's been involved in, and the arguments around that are
15 changing, and yet at the same time, he's not producing
16 documents in this case and he's not agreeing to say anything in
17 this case. And it's grossly unfair.

18 **THE COURT:** All right. I'm not -- as I said, I will
19 decide whether he can intervene, whether he had standing,
20 whether he has all that, before I read -- before I read what he
21 says. I just think it's a matter of fairness because the truth
22 is you can't undue it once it's there. And I do have
23 concerns --

24 **MR. ERHLICH:** Can't undue the in camera.

25 **THE COURT:** Right. Exactly. But I'll read everything

1 you write.

2 **MR. ERHLICH:** I will say our papers do address the
3 Fifth Amendment issue as being the basis for which we're making
4 the request.

5 **THE COURT:** All right.

6 **MR. ERHLICH:** So it's squarely there.

7 **THE COURT:** You filed your motion. You'll file your
8 opposition. You will file your reply.

9 **MR. ERHLICH:** Can I say, for the record, I don't agree
10 with the characterization about Mr. Levandowski's conduct in
11 discovery, but we'll talk to Mr. Cooper.

12 **THE COURT:** You can. Of course you can say that.

13 **MR. ERHLICH:** Thank you.

14 **THE COURT:** Right. That's an example of an issue that
15 should be brought to Mr. Cooper first, and then before it's
16 then -- then he can let Ms. Means know when it's teed up for
17 me.

18 Let's see. Today is the 11th. I don't think I could
19 really -- your opposition and then your reply --

20 **MS. BAILY:** So we have the reply on the original
21 motion. That's currently set for tomorrow. And then --

22 **THE COURT:** Would you like until Monday?

23 **MS. BAILY:** I mean, I do not want to hold -- do
24 anything to hold up the schedule. So it just depends on when
25 your first availability is for a hearing.

1 The only reason that we even thought about asking for
2 Monday is because we had been told today that there are
3 documents coming today, and so, you know, if there's going to
4 be something made of these documents, we would like a chance to
5 review them before filing our reply.

6 **THE COURT:** Well, and we should specially set this
7 hearing, I think.

8 June 1st.

9 **MS. BAILY:** If that is your earliest availability.

10 **THE COURT:** We are going to need some time. It's a
11 big issue, and I have settlements.

12 **MR. GONZALEZ:** So, Your Honor, I --

13 **THE COURT:** You can't do the 1st?

14 **MR. GONZALEZ:** I'm in trial that week. I was
15 concerned as it is with the 8th. I hadn't raised the 8th
16 because I wanted to see how the trial goes. You know how
17 sometimes you settle at the end. I don't think I'm going to.
18 I think we are going to be in trial that week.

19 It's only a week earlier. It's not really going to make
20 that big a difference in the large scheme of things.

21 **THE COURT:** How about the 24th? And I will be as
22 ready as I am.

23 **MS. BAILY:** Sorry. The 24th will be the hearing?

24 **MR. GONZALEZ:** I could do the 24th. My only
25 reservation -- I could do the 24th, if we need to. My only

1 reservation is there is a lot there for the Court to absorb,
2 and I know how much you have on your calendar. If you think
3 you can do it on the 24th --

4 **THE COURT:** I can do a hearing. It does not mean I'm
5 going to issue the decision the next day.

6 **MR. GONZALEZ:** Understood.

7 **THE COURT:** And it may be that I decide, depending how
8 the hearing goes, there is something else I can frame -- I
9 actually think it makes sense to maybe have it. My initial
10 take on what I've seen and read and thought, we can narrow it
11 in some sense, maybe I will want additional argument on
12 something, and get that process going.

13 **MR. GONZALEZ:** Twenty-fourth will be fine.

14 **MS. BAILY:** In light of that hearing date, is
15 Your Honor willing to have our reply on Monday?

16 **THE COURT:** Yes. Absolutely. Trust me, I won't be
17 reading it this weekend.

18 **MS. BAILY:** I don't know why not.

19 **MR. GONZALEZ:** What time on the 24th, Your Honor?

20 **THE COURT:** How about 10:00? 9:00?

21 **MR. ERHLICH:** Your Honor, I know I have not even been
22 allowed into the party here, but I have a very difficult
23 conflict on the 24th, and -- at least through 1:00.

24 **THE COURT:** Could you be here by 2:00?

25 **MR. ERHLICH:** I think so, yes.

1 **THE COURT:** 2:00 on the 24th.

2 **MR. GONZALEZ:** That would be fine, Your Honor. Thank
3 you.

4 **MS. BAILY:** Just to be clear, Judge Alsup usually
5 expects briefs at noon, but if we could have until the end of
6 the day on Monday?

7 **THE COURT:** Yes. He referred all discovery to me. So
8 what that means is you should work with Mr. Cooper, and those
9 rules don't apply. You should feel free to ask anything.

10 **MS. BAILY:** Thank you, Your Honor.

11 **THE COURT:** We are sticking to his deadlines, though,
12 of course, and so I understand that there is urgency with
13 respect to discovery.

14 **MR. GONZALEZ:** I have one issue, but I didn't want to
15 interrupt you. Were you finished?

16 So, Your Honor, I appreciate you're going to tell us to go
17 see Mr. Cooper, and I would be happy to talk to Mr. Cooper
18 about all of this stuff, but I'm wondering what your procedures
19 are for imposing some type of limitation on discovery.

20 I ask that question because you may or may not know that
21 we've already responded to 72 document requests already in this
22 case. And in the last two days, they served us with 152 more.
23 And these are not simple document requests. I can show them to
24 you at the appropriate time. They are very extensive. In
25 fact, I read just the first 40 because I was curious about "all

1 documents and communications." Of the first 40 requests, 20 of
2 them have that language.

3 **THE COURT:** So let me tell you what my theory is about
4 document requests and the way it should work, and actually I
5 did a State Bar Webcast yesterday on this.

6 You serve your document request, and you should never
7 respond without sitting and talking to the other side; right?
8 Because always when you're propounding discovery, you're going
9 to be as broad as possible because the last thing you want is
10 the argument, which maybe I've seen made here, *Oh, no, it*
11 *wasn't covered by the document request*, so they're always
12 broad.

13 But then what you do is you sit down and you say, *What is*
14 *it you're looking for and why? Okay. This is how we get there*
15 *and this is what we do*. So that's what I really want you to
16 do. I think you should do that.

17 So you got that request; Ms. Baily is here. You can have
18 that conversation now. You can have it tomorrow. You should
19 have it pronto. And I think you should try to have it among
20 yourselves. To the extent you still can't narrow it enough,
21 then that's when you involve Mr. Cooper there.

22 But really, you know, document requests -- I personally
23 believe they cannot be responded to without people having
24 words, actual face-to-face conversation. And when I have a
25 document dispute in front of me, my first word out of my mouth

1 is *Why? why do you need this?* I don't care what the language
2 of the request was or anything. I just want to know why.

3 Okay. Okay. Why. That sounds good. *How do we get it to*
4 *them?* That's it. So just sort of in plain English language.

5 It's a conversation you have among yourselves and then
6 with Mr. Cooper and then you can bring it to me when it's
7 narrowed. So at that point, I don't actually care what the
8 language of the request is. What I care is what are the
9 documents you're looking for and why are you saying you can't
10 produce them, if you are going to say that.

11 **MR. GONZALEZ:** That's very helpful, Your Honor. Thank
12 you.

13 **MR. PERLSON:** Your Honor, that's great.

14 One of the things that I had proposed to Mr. Gonzalez
15 today, which I think perhaps prompted his statement today, is
16 that it seemed to us that given our abbreviated schedule, that,
17 you know, it doesn't make sense to wait 30 days to get
18 objections and responses and that we thought that just even
19 getting the objections after 14 days and then maybe shortening
20 the period for both of us to respond -- same true with
21 interrogatories and document requests -- might be a good idea,
22 given the short time frame, but we can address that further
23 with Mr. Cooper.

24 **THE COURT:** Yes. But really it's sort of -- yeah. I
25 mean, basically you want to know what are you agreeing to

1 produce, what are you not agreeing to produce and why. And
2 then if there is a dispute about what they're not agreeing to
3 produce, then through Mr. Cooper, that can be brought to me and
4 I can adjudicate that.

5 **MR. PERLSON:** I think one of the things we've seen
6 over time -- and there have been attempts to narrow the issues
7 and things like that -- but doing that stuff earlier rather
8 than later is going to be critical so there is not, like, a
9 crunch of a bunch of issues that we are all trying to jam in.

10 **THE COURT:** This is like totally off topic or even
11 sort of not even my realm, but Mr. Cooper is here and we have
12 some experience with that.

13 Whenever you have these type -- and you've probably all
14 discussed this because you are so experienced, but I just can't
15 help it. I'm just going to throw it out there.

16 Whenever you have trade secret cases like this, often one
17 way to try to get to the nub of the matter is to hire some
18 neutral, neutral, neutral person to go in and do the forensic
19 examination of the servers and the like.

20 Anyway, I just throw that out there as something I've seen
21 before.

22 The parties certainly have plenty of money to pay for the
23 best forensic examiner you could ever come up with.

24 I just throw that out there as something I've seen work
25 actually in some cases, as long as it's someone the parties

1 mutually agree to and trust, and then the competitive concerns
2 are alleviated with that.

3 Anyway, couldn't help myself. Sorry.

4 **MR. GONZALEZ:** I appreciate that, Your Honor.

5 **MR. PERLSON:** I think there has been some discussion
6 of that. There certainly hasn't been anything worked out
7 specifically.

8 **THE COURT:** Yes. But with a trade secret case, it's
9 often just a way of getting to that sort of answer in a way
10 that both sides can sort of trust and feel comfortable with, if
11 you can get there.

12 Okay. So we will see you on May 24th at 2:00 p.m.

13 I will see you, Mr. Ehrlich, one way or the other.

14 **MR. ERHLICH:** Yes. Thank you.

15 **THE COURT:** Okay. Thank you. And thank you,
16 Mr. Cooper.

17 **MR. COOPER:** Thank you.

18 (Proceedings adjourned at 2:47 p.m.)
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, May 11, 2017

Pamela A. Batalo

Pamela A. Batalo, CSR No. 3593, RMR, FCRR
U.S. Court Reporter